

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT E. MILLER and DEPARTMENT OF THE ARMY, COMMUNITY
RELATIONS DIVISION, Fort Leavenworth, KS

*Docket No. 03-1485; Submitted on the Record;
Issued November 4, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely filed and not establishing clear evidence of error.

On November 9, 1989 appellant, then a 57-year-old sports coordinator, filed a claim for traumatic injury alleging that on June 19, 1989 he injured his back while in the performance of duty. On October 1, 1998 the Office accepted appellant's claim for aggravation of a lumbar strain, noting that the date of injury was June 26, 1989, and placed him on the periodic rolls for total disability compensation.¹

In a report dated August 10, 1998, Dr. Gary D. Boston, appellant's treating physician, stated that he examined appellant on July 10, 1998 for continued disability due to his lumbar strain. Dr. Boston noted that appellant related a worsening of his back condition, that he had difficulty in standing and sitting for any length of time and that he had right leg pain radiating to his toes. Upon examination, Dr. Boston found that appellant's leg extension was 5 degrees, flexion was 30 degrees and lateral bending was 15 degrees. When observed walking, he advised that appellant was unable to stand straight up and was bent over. Dr. Boston opined that appellant was totally disabled from duty that would require bending, lifting or stooping.

The Office continued to develop the claim, and on June 30, 1999 referred appellant to Dr. James Armstrong for a second opinion evaluation. In a report dated July 28, 1999, Dr. Armstrong determined that appellant no longer had residuals of his work-related lumbar strain and could return to gainful employment.

¹ The record indicates that appellant was injured on June 26, 1989. The claim was initially denied in a decision dated December 28, 1989. However, following appellant's request for an oral hearing, on June 12, 1990, an Office hearing representative vacated the December 28, 1989 decision and remanded the case to the Office.

On June 1, 2000 the Office referred appellant to Dr. Dale Dalenberg, a Board-certified orthopedic surgeon and an impartial medical examiner, to resolve the conflict in medical opinion between Dr. Boston and Dr. Armstrong.

In a July 7, 2000 report, Dr. Dalenberg stated that he examined appellant on July 5, 2000, and found that appellant was no longer disabled from work as a result of the June 26, 1989 work injury. He noted that appellant was disabled as a result of a degenerative L5-S1 disc which predated the work-related injury, and a severe case of epidural lipomatosis caused by his obesity. Dr. Dalenberg advised that appellant could return to light duty with restrictions that were not work related.

Based on the impartial medical examiner's July 7, 2000 report, the Office issued a notice of proposed termination of compensation on January 2, 2001. In a letter dated February 1, 2001, appellant stated that Dr. Dalenberg failed to consider that his June 1989 work-related injury aggravated a preexisting injury to his back and that he had not fully recovered from those conditions. By decision dated February 9, 2001, the Office terminated appellant's compensation on the grounds that he had no residuals of the June 1989 injury.²

In a letter dated January 7, 2003, appellant, through counsel, requested reconsideration stating that appellant should not have been terminated after the examination by Dr. Dalenberg "after qualifying for disability many years ago."³

By decision dated March 18, 2003, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error in the Office's last merit decision.

The Board finds that the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The only Office decision before the Board in the instant case is dated March 18, 2003, denying appellant's request for reconsideration. Because more than one year has elapsed between the merit decision issued February 9, 2001 and the filing of this appeal on May 23, 2003, the Board lacks jurisdiction to review the merits of appellant's claim.⁴

² In a letter dated March 1, 2001, appellant stated that he had received the Office's February 9, 2001 termination decision but misplaced it. He asked for another copy. In an internal memorandum dated April 19, 2001, the Office noted that appellant alleged that he filed a request for reconsideration. The Office telephoned appellant and left a message that it did not have any request for reconsideration on his claim. On May 17, 2001 he was provided a copy of Dr. Dalenberg's report. On October 4, 2002 appellant requested a copy of his case record. This was provided to him on October 31, 2002.

³ The Board notes that counsel's letter was dated incorrectly as January 7, 2002.

⁴ 20 C.F.R. §§ 501.2(c); 501.3(d)(2); see *John Reese*, 49 ECAB 397, 399 (1998).

Section 8128(a) of the Federal Employees' Compensation Act⁵ vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”⁷

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).⁸ This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁹

In this case, the Office denied appellant's January 7, 2003 request for reconsideration of the Office's February 9, 2001 merit decision terminating his compensation as untimely filed. The Board finds that the January 7, 2003 request for reconsideration was filed more than one year after the February 9, 2001 merit decision and was, therefore, untimely.

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in the most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹² Evidence that does not raise a

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8128(a).

⁷ *Id.*

⁸ *Diane Matchem*, 48 ECAB 532, 533 (1997), citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ 20 C.F.R. § 10.607(b).

¹¹ *Nancy Marciano*, 50 ECAB 110, 114 (1998).

¹² *Leona N. Travis*, 43 ECAB 227, 241 (1991).

substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Thus, evidence such as a well-rationalized medical report that, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and does not require merit review of a case.¹⁴

This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁵ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office improperly denied a merit review in the face of such evidence.¹⁶

In this case, appellant submitted no new evidence with his January 7, 2003 request for reconsideration. Appellant's counsel simply contended that appellant should not have been terminated following examination by Dr. Dalenberg "after qualifying for disability many years ago." The Board finds that this statement does not raise a substantial question regarding the correctness of the February 9, 2001 Office decision as he is essentially asking that the Office reweigh Dr. Dalenberg's referee examination.¹⁷ This contention fails to demonstrate clear error on the part of the Office in terminating appellant's compensation benefits. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review.

¹³ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁴ *Annie Billingsley*, 50 ECAB 210, 212, n.12 (1998); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.a (June 2002)

¹⁵ *Jimmy L. Day*, 48 ECAB 654, 656 (1997).

¹⁶ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁷ *See* 20 C.F.R. § 10.606 (1999).

The March 18, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
November 4, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member